Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1454

NOVELLA H. TRAGESER,

Petitioner,

—v.—

LIBBIE REHABILITATION CENTER, INC.,
t/a Libbie Convalescent Home,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

NOVELLA H. TRAGESER,

Petitioner,

-v.-

LIBBIE REHABILITATION CENTER, INC. t/a Libbie Convalescent Home,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Novella H. Trageser prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on December 18, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is appended hereto at pp. 2A - 10A, infra. The opinion of the district court is reported at 462 F.Supp. 424

(E.D.Va. 1977) and is appended hereto at pp. 11A - 15A, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 18, 1978, and is appended hereto at p. 1A, infra. This Court has jurisdiction to review that judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits all recipients of federal financial assistance from discriminating against handicapped persons in employment.

2. Whether Section 120(a) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, P.L. 95-602 (Nov. 6, 1978) was intended by Congress to exempt employment discrimination from the discrimination prohibited by Section 504 in private suits unless a primary objective of the federal financial assistance is to provide employment.

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. § 794 (Supp. 1977), provides in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The relevant portion of § 120(a) of the Rehabilitation, Comprehensive Services and Developmental Amendments of 1978, P.L. 95-602, to be codified as 29 U.S.C. § 794a (a)(2), provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under § 504 of this Act.

Section 604 of Title VI of the Civil Rights Act of 1964, codified as 42 U.S.C. § 2000d-3, provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any

employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

STATEMENT OF THE CASE

This action was brought pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (hereinafter the "Rehabilitation Act") and 42 U.S.C. § 1983, with jurisdiction based on the Rehabilitation Act and on 28 U.S.C. § 1343. Petitioner Novella H. Trageser, a registered nurse, is a handicapped person[1/] who was employed by the respondent Libbie Rehabilitation Center, Inc., from 1971 until September 1976.[2/] Respondent is a private corporation, operating a nursing home for profit, which receives substantial federal funds under

1/ Petitioner suffers from a hereditary, progressive visual impairment known as retinitis pigmentosa. 3A. It is undisputed that petitioner is a handicapped person within the meaning of the Rehabilitation Act.

2/ Petitioner received promotions to the position of supervisor of Libbie Convalescent Center, Assistant Director of Nurses, and finally Director of Nurses, the position she occupied at the time her employment was terminated. 3A.

under the Medicare, Medicaid, and Veterans Administration programs. 3A. At a meeting of its Board of Directors on June 7, 1976, respondent decided to dismiss petitioner "as soon as possible" because of her impaired eyesight. 4A. Upon learning of her imminent dismissal, petitioner resigned.[3/]

Petitioner alleged that respondent's decision to terminate her employment solely because of her physical handicap constituted discrimination in violation of Section 504 of the Rehabilitation Act. The district court dismissed her complaint, prior to trial, holding that § 504 does not create a private right of action and, alternatively, that § 504 does not apply to respondent. 13A-14A.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit; after briefing and oral argument, Congress enacted the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, P.L. 95-602, Nov. 6 1978 (hereinafter the "1978 Amendments"). The Court of Appeals,

3/ The court below treated petitioner's resignation as "tantamount to discharge." 4A.

sua sponte, requested supplemental briefs concerning the "impact" of the 1978 Amendments "on this case." Without passing on either of the district court's grounds for judgment,[4/] the Court of Appeals affirmed dismissal of the complaint, holding that the 1978 Amendments required the application of § 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3 (hereinafter "Title VI") to Section 504 of the Rehabilitation Act, and holding further that because of § 604, a private action under § 504 to redress employment discrimination may not be maintained unless a primary objective of the federal financial assistance to the allegedly discriminatory employer is to provide employment. 8A.

4/ Accordingly, the broader questions of whether there can be a private right of action under § 504 in a non-employment context or when a primary objective of the federal financial assistance is to provide employment, is not at issue here. The first question is presently before this Court in Southeastern Community College v. Davis, No. 77-1237. Also, because the Court of Appeals did not pass upon the application of § 504 to respondent, that issue is not before the Court.

REASONS FOR GRANTING THE WRIT

This case involves an extremely important statutory issue. This Court, recognizing the importance of § 504, has granted certiorari in Southeastern Community College v. Davis, No. 77-1237, which involves the closely related question of whether § 504 authorizes private suits alleging discrimination in higher education. Whether § 504 authorizes private suits to redress employment discrimination is a question of equal importance. Indeed, access to higher education is a meaningful right only if employment opportunities are thereafter available on a non-discriminatory basis. The decision of the Court of Appeals conflicts with the Congressional purpose in enacting § 504 of the Rehabilitation Act and § 120(a) of the 1978 Amendments, and with the well-established construction given § 504 by HEW, the administrative agency charged with its enforcement. The decision below severely disrupts HEW's nation-wide efforts to administer and enforce § 504,[5/] and is of vital concern

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5/ This case is of such importance to the federal government's § 504 enforcement program that the United States filed a brief amicus curiae in support of the petitioner in the Court of Appeals.

to thousands of recipients of federal financial assistance[6/] and to millions of handicapped persons.[7/]

6/ At least 36,000 recipients of funds distributed by the Department of Health, Education and Welfare alone are affected. See Hearings on Implementation of Section 504 before the Select Subcomm. on Education of the House Comm. on Education and Labor, 95th Congress, 1st Session 299, 358 (1977) (testimony of David S. Tatel, Director, HEW Office of Civil Rights).

7/ There are an estimated 15.5 million non-institutionalized handicapped persons between the ages of 18 and 64. H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. ___, 1978 U.S. Code Cong. & Admin. News 7513. There are an estimated 6 million disabled persons who could benefit from vocational rehabilitation, and 500,000 persons with disabilities are added to the national population annually. H.R. Rep. No. 95-1149, supra at ___, 1978 U.S. Code Cong. & Admin. News, supra at 7499.

I. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE CONGRESSIONAL PURPOSE IN ENACTING SECTION 504 OF THE REHABILITATION ACT, WITH SECTION 120(a) OF THE 1978 AMENDMENTS, AND WITH THE INTERPRETATION OF SECTION 504 BY THE ADMINISTRATIVE AGENCY CHARGED WITH ITS ENFORCEMENT.

A. As Originally Enacted, Section 504 Clearly Prohibited Discrimination In Employment On The Basis Of Handicap.

It is indisputable that prior to the 1978 Amendments, § 504 outlawed all employment discrimination, regardless of the object of Federal aid. Section 504 was originally enacted as part of Title V of a comprehensive reform of the federal vocational rehabilitation program. The other principal sections of Title V, with one exception, concerned employment of handicapped individuals.[8/] As originally enacted, the term "handicapped individual"

8/ Section 501 required that federal government agencies and departments take affirmative action to employ and advance in employment handicapped persons. 29 U.S.C. § 791. Section 503 required federal government contractors and subcontractors to take affirmative action to employ and advance in employment qualified handicapped individuals.

was defined solely in relationship to employment.[9/]

An explicit purpose of the 1974 Act was to:

> "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." 29 U.S.C. § 701(8).

The following year, recognizing that its definition of handicapped individual was limited to employment, Congress amended § 7(6) to exclude reference to employment.[10/] Congress made

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9/ Section 7(6) of the Rehabilitation Act of 1973 provided:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

10/ P.L. 93-516, § 111(a) provided:

> Section 7(6) of such Act is amended by adding at the end thereof the following new sentence: "For the purposes of titles IV and V of this Act, such term means any person who (A) has a physical or mental impairment which substantially

(FN 10 continued on next page)

clear, however, that it did not intend to remove employment discrimination from the scope of § 504; rather, the intention was to preclude the narrow application of § 504 solely to employment.[11/]

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limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

11/ The Senate Report on the 1974 amendment stated:

> Section 7(6) of the Rehabilitation Act of 1973 defines "handicapped individual." That definition has proven to be troublesome in its application to provisions of the Act such as sections 504 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services. It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual's potential benefit from vocational rehabilitation services under titles I and III (in the case of both sections 503 and 504) of the Act." S. Rep. No. 93-1139, 93rd Cong., 2d Sess. 23 (1974).

In describing the new definition, the report further explained:

> Thus, a new definition has been developed which would provide

(FN 11 continued on next page)

Prior to the 1978 Amendments, numerous courts had ruled that § 504 prohibits employment discrimination, regardless of the object of Federal aid. See Whitaker v. Board of Higher Education of the City of New York, 461 F. Supp. 99 (E.D.N.Y. 1978); Davis v. Boucher, 451 F. Supp. 791 (E.D.Pa. 1978); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977). See also Gurmankin v. Costanza, 556 F.2d 184, 186 (3rd Cir. 1977).

Thus, the language of the original legislation, the stated Congressional purpose, the legislative history of the 1974 clarifying amendments and judicial decisions make clear that § 504 broadly prohibited discrimination in employment in programs receiving federal funds, without regard to whether the primary object of federal

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sufficient latitude (but still not be totally open ended), particularly for the nondiscrimination programs carried out under sections 501, 503, and 504 with respect to the employment of handicapped individuals in the Federal government, under Federal contracts and subcontracts, pursuant to the provision of Federal financial assistance, and in State rehabilitation agencies and local facilities, and the participation of handicapped individuals in any program or activity receiving Federal financial assistance." Id. (emphasis added).

financial assistance was to provide employment.

B. Section 120(a) Of The 1978 Amendments Was Not Intended To Eliminate Employment Discrimination From The Scope Of Section 504.

Against this background, the question is whether Congress intended to change the substantive scope of § 504 in the 1978 Amendments. Given the clear legislative purpose to promote and expand employment opportunities, a Congressional intent to cut back on § 504 is not lightly to be inferred.

The Court of Appeals misconstrued § 120(a) of the 1978 Amendments, in holding that § 604 of Title VI removed employment discrimination from the scope of § 504 unless a primary objective of federal funds was to provide employment. To the contrary, the purpose of § 120(a) was to expand the rights of handicapped individuals by providing an additional enforcement mechanism for § 504 without cutting back on the substantive scope of its application. This is readily apparent from the language of the 1978 Amendments taken as a whole and from its legislative history.

1. The language of § 120(a).

The language of § 120(a) does not support the conclusion of the Court of Appeals that 42 U.S.C. § 2000d-3 precludes private suits for employment discrimination under § 504 unless the primary objective of the federal funds is to provide employment. Had Congress intended to make § 504 subject to all of Title VI, it could have so stated. Significantly, Congress limited the applicability of Title VI to its provisions concerning "remedies, procedures, and rights," that is, the remedies and procedures for effecting compliance with § 2000d as set forth in 42 U.S.C. § 2000d-1, and the right to judicial review of administrative agency action set forth in 42 U.S.C. § 2000d-2. Clearly, all of Title VI cannot apply to § 504, for 42 U.S.C. §§ 2000d-5 and 2000d-6 are patently inapplicable. By its terms, § 604 of Title VI (42 U.S.C. § 2000d-3) does not set forth rights, remedies or procedures, but rather limits the substantive coverage of § 601. Accordingly, it is clear from the face of § 604 that it was not intended to apply to § 504 of the Rehabilitation Act.

That § 120(a) of the 1978 Amendments was intended solely to provide an

expanded enforcement mechanism for § 504, not to restrict its coverage of employment discrimination, is further demonstrated by the legislative history of the 1978 Amendments.

2. The legislative history of the relevant subsection.

The relevant subsection originated in the Senate. The House bill contained no similar provision. See House Conference Rep. No. 95-1780, 95th Cong. 2d Sess. ___. The report of the Senate Committee on Human Resources explains the relevant section as follows:

> Subsection (a)(2) of the new section makes available the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 to any person aggrieved by any act or failure to act by any recipient of Federal assistance or any Federal provider of Federal assistance under section 504 of the Rehabilitation Act of 1973.
>
> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

The joint explanatory statement accompanying the conference report

> on H.R. 14225 (the Rehabilitation Act Amendments of 1974) stressed this parallel relationship between section 504 and title VI of the Civil Rights Act of 1964, and noted that application of the provisions relating to discrimination on the basis of race, creed, color, or national origin would assure administrative due process, and provide for administrative consistency within the Federal government. (emphasis added) S. Rep. No. 95-890, Comm. on Human Resources, 95th Cong., 2d Sess. 19 (1978)12/

Since the legislative history indicates that the purpose of this section was to

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12/ The joint explanatory statement in connection with the Rehabilitation Act Amendments of 1974 indicated that although enforcement mechanisms were not expressly provided for under §504 it was the intent of Congress that the essential features of Title VI enforcement would be applied to § 504:

> "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide

"codify existing practice" under HEW regulations, those regulations control its construction. HEW has consistently

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> for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended. (emphasis added).
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient, or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the

(FN 12 continued on next page)

interpreted § 504 to prohibit employment discrimination in all programs and activities receiving or benefitting from federal financial assistance, without regard to the objective of federal financial assistance. 45 C.F.R. §§ 84.11-18 (issued May 7, 1977 and effective June 3, 1977 , 42 Fed. Reg. 22676); 45 C.F.R. §§ 85.53-55 (effective January 13, 1978), 43 Fed. Reg. 2132-39).13/

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models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. S. Rep. No. 93-1297, 93rd Cong., 2d Sess. 39-40. (emphasis added).

The reference to this language from the 1974 report is significant inasmuch as it makes clear that this section makes no substantive change in the scope of § 504, and that it merely makes available enforcement mechanisms for suits under § 504.

13/ Indeed, in its publication of proposed rules, HEW specifically noted that although § 504 was substantially similar to Title VI, it differed in that § 504 prohibited employment discrimination. 41 Fed. Reg. 29518 (July 16, 1976).

The decision of the Court of Appeals is thus contrary to the well-established construction given § 504 by the administrative agency charged with its enforcement.14/

3. Other provisions of the 1978 Amendments

Other provisions of the 1978 Amendments buttress the conclusion that the purpose of the legislation as a whole was to expand the rights of handicapped persons.

First, § 120(a) also makes available the Title VII rights of federal employees, 42 U.S.C. § 2000c-5 (f) through (k), to suits brought pursuant to § 501 of the Rehabilitation Act.15/

14/ The Court of Appeals dismissed HEW's interpretation, stating that HEW had not yet had the opportunity to conform its regulations to the 1978 Amendments. But since § 120(a) was intended to codify existing HEW regulations, no changes in those were required.

15/ The Court of Appeals mistakenly relied on the inclusion of Title VII remedies for § 501 violations to support its conclusion that § 504 did not apply to employment unless a primary object of federal funding was to provide employment. To the contrary, this evidences Congress' purpose to adopt solely expanded enforcement mechanisms for § 504 without cutting back on the substantive scope of its coverage. Section 501 applies solely to employment so that Title VII was fully effective to

(FN 15 continued on next page)

Another clause of 120(a), providing for the award of attorneys's fees to prevailing parties in actions to enforce the provisions of Title V of the Rehabilitation Act, further underscores that Congress' sole intent in the 1978 Amendments was to encourage and enhance private enforcement rights for all of the provisions of Title V.

Finally, the clarification of the definition of handicapped individuals conclusively establishes that § 504 applies to employment.16/

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provide a remedy for its violation. Section 504 applies not only to employment, but also to housing, transportation, health care, education, social services and welfare. Mere adoption of Title VII would have provided no remedy for violations of these other aspects of § 504. Title VI is closer in its scope of coverage and the class to whom it applies and, therefore, the enforcement mechanisms of that statute were more appropriate for § 504 than were the enforcement mechanisms of Title VII.

16/ Section 122(a)(6) added the following to the definition of "handicapped individual" contained in § 7(6) of the Rehabilitation Act:

> For purposes of sections 503 and 504 as such sections relate to employment such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of

(FN 16 continued on next page)

In summary, it would be truly remarkable that Congress, in enacting § 120(a), would eliminate employment discrimination from the scope of coverage of § 504, when equal employment opportunity was an express statutory purpose, the consistent administrative interpretation of the statute included all employment discrimination, and the entire thrust of the legislative history indicates that Congress intended to incorporate earlier developed enforcement mechanisms and interpretations. It is even more remarkable that Congress would eliminate employment discrimination from § 504 without a single comment, either in hearings, reports, or debates, to the effect that such a result was desirable.17/

> the job in question or whose employment by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

If § 504 did not "relate to employment" discrimination it would not have been necessary to include that section in the amendment.

17/ Indeed, in oversight hearings conducted by the Select Subcommittee on Education of the House Committee on Education and Labor on the Implementation of § 504, 95th Cong., 2d Sess., David Tatel, the Director of the Office for Civil Rights of HEW, testified that 70% of the complaints received under

(FN 17 continued on next page)

The decision of the Court of Appeals is in direct conflict with the intent of Congress and with the well-established administrative interpretation of § 504.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration. Alternatively, this Court should grant certiorari and summarily reverse the judgment below.

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§ 504 concerned employment. Id. at 303, 341. In his testimony, he also fully described HEW's enforcement program and regulations, and his belief that there should be a private right of action to enforce § 504. Id. at 291-337, 358,366.

Dated: March 16, 1979
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Filed December 18, 1978

J U D G M E N T

United States Court of Appeals
for the
Fourth Circuit

No. 77-2224

Novella H. Trageser,

Appellant,

versus

Libbie Rehabilitation Center, Inc.,
t/a Libbie Convalescent Home,

Appellee.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

[William K. Slate II]

CLERK

P U B L I S H E D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2224

Novella H. Trageser,

Appellant,

-v-

Libbie Rehabilitation Center, Inc.,
t/a Libbie Convalescent Home,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued June 7, 1978
Decided December 18, 1978

Before BUTZNER and HALL, Circuit Judges, and ROBERT F. CHAPMAN, United States District Judge for the District of South Carolina, sitting by designation.

G. Timothy Oksman (Farino & Oksman on brief) for appellant; Lewis T. Booker (Charles S. McCandlish, Hunton & Williams on brief) for appellee. United States of America (Drew S. Days, III, Assistant Attorney General, Walter W. Barnett and Judith E. Wolf, attorneys, Dept. of Justice on brief) and National Federation of the Blind (John F. Rick on brief) amici curiae in support of appellant.

BUTZNER, Circuit Judge:

Novella H. Trageser appeals the district court's dismissal of her complaint alleging that the termination of her employment at Libbie Rehabilitation Center constituted handicap discrimination in violation of §504 of the Rehabilitation Act of 1973, the fifth and fourteenth amendments to the Constitution, and 42 U.S.C. § 1983. We affirm because § 120(a) of the Comprehensive Rehabilitation Services Amendments of 1978 forecloses her claim under the Rehabilitation Act of 1973, and lack of governmental action precludes recovery on the other grounds.

I

Libbie, a private corporation, operates a nursing home for profit in Richmond, Virginia. It receives substantial income from the state and federal governments in the form of Medicare, Medicaid, Veterans Administration, and welfare payments. The purpose of these payments is to compensate for treatment of specified patients who are entitled to the benefits. The home is subject to inspection by the Virginia Department of Health.

Trageser, a registered nurse, was hired in 1971 and promoted to director of nurses in 1975. Her sight is impaired by a condition known as retinitis pigmentosa, which is hereditary and progressive.

On April 28, 1976, the certification officer from the Virginia Department of Health conducted a regular inspection of the nursing home. The inspector told the administrator of the home that Trageser's eyesight had deteriorated since the last inspection and asked what the home intended to do about it. The admin-

istrator relayed these comments to the board of directors. At its meeting on June 7, 1976, the board resolved to dismiss her. Upon learning of this decision, Trageser resigned.

Trageser then brought this action seeking reinstatement, back pay, and an injunction against payment of federal financial assistance to the home unless she was reinstated. The district court treated the termination of her employment as tantamount to discharge, but it granted Libbie's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. See Trageser v. Libbie Rehabilitation Center, 16 E.P.D. ¶ 8117, 17 F.E.P. Cases 398 (E.D. Va. 1977).

II

Trageser bases her claim on § 504 of the Rehabilitation Act of 1973[1] which provides as follows:

> No otherwise qualified handicapped individual in the United States. . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In § 120(a) of the Comprehensive Rehabilitation Services Amendments of 1978, Congress added, among other provisions, § 505(a)(2) [2] which states:

1. 29 U.S.C.A. § 794 (1975).

2. Act of November 6, 1978, Pub.L.No. 95-602, § 120(a), H.R. Conf. Rep. No. 95-1780 on H.R. 12467, 95th Cong., 2d Sess. 29 (1978), 124 Cong. Rec. H12675 (daily ed., Oct. 12, 1978) (to be codified as 29 U.S.C. § 795(a)(2).

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act of failure to act by any recipient of Federal assistance or Federal provider of such assistance under §504 of this Act.

Title VI contains the prototype of § 504 of the Rehabilitation Act. See Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1280 and n.9 (7th Cir. 1977). Section 601 of Title VI [3] provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The broad prohibition of § 601 is, however, qualified by § 604 [4] which creates the following limitation:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.[5]

3. 42 U.S.C. § 2000d.

4. 42 U.S.C. § 2000d-3.

5. The §604 restriction on enforcement of fair employment practices is tempered in appropriate cases by availability of the remedies of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., and of 42 U.S.C. §1983.

Although § 604 expressly curtails the authority of federal departments and agencies, it also restricts private suits. Thus, because of § 604, Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid,[6] or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid.[7]

Title VII of the Civil Rights Act of 1964[8] provides the primary statutory remedies for racial and ethnic discrimination in employment. Recognizing this, Congress supplemented the Rehabilitation Act by including in § 120(a) of the 1978 amendments a new subsection 505(a)(1)[9]

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6. See, e.g., Quiroz v. City of Santa Ana, 17 E.P.D. ¶8631 at p.7221 (C.D. Calif. 1978); Feliciano v. Romney, 363 F.Supp. 656, 672 (S.D.N.Y. 1973).

7. See Caulfield v. Board of Education, ___ F.2d ___, 17 E.P.D. ¶8600 at p.7078 (2d Cir. 1978); United States v. Jefferson County Board of Education, 372 F.2d 836, 883 (5th Cir. 1966).

8. 42 U.S.C. §2000e, et seq.

9. Section 505(a)(1) (to be codified as 29 U.S.C. §795(a)(1) provides in pertinent part:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964. . . including the application of sections 706(f) through 706(k). . . shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

which makes the pertinent remedies, procedures, and rights of Title VII available to federal employees who complain of handicap discrimination in employment in violation of § 501 of the Rehabilitation Act.[10] Congress also could have utilized Title VII to define the rights and remedies of a person in Trageser's position who must rely on § 504. Instead, for employees of private institutions receiving federal financial aid, § 120(a) of the 1978 amendments makes available only the remedies, procedures, and rights of Title VI, which, as we have noted above, contains the restriction of § 604. The distinction that § 120(a) draws between the relief available to federal employees and that available to employees of private institutions receiving federal assistance could not have been inadvertent. We therefore conclude that we must apply the limitation contained in § 604 of Title VI to § 504 of the Rehabilitation Act in literal compliance with §120(a) of the 1978 amendments.[11]

We cannot accept Trageser's contention that the 1978 amendments are inapplicable to her 1976 dismissal. We must decide this case in accordance with the law as it exists at the time we render our decision "'unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" Cort v. Ash,

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10. 29 U.S.C. § 791.

11. The Secretary of Health, Education, and Welfare has promulgated regulations to implement §504 of the Rehabilitation Act of 1973. See 45 C.F.R. Part 84 (1977). He has not, however, had an opportunity to conform thlse regulations to the 1978 amendments incorporating §604 of Title VI.

422 U.S. 66, 76-77 (1975). In the absence of legislative history to the contrary, the explicit incorporation of §604 of Title VI simply confirms a plausible reading of §504 as originally enacted. See, e.g., Guy, The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues, 7 U. Balt. L. Rev. 183, 207 (1978). We therefore find no manifest injustice in applying the amendments to illuminate this case which was pending when they were enacted.

A private action under § 504 to redress employment discrimination therefore may not be maintained unless a primary objective of the federal financial assistance is to provide employment. There has been no such allegation in this case; nor could there be one. Viewing the complaint in the light most favorable to Trageser, in compliance with Federal Rule of Civil Procedure 12(b)(6), we nevertheless hold that she cannot prevail on her § 504 claim.[12]

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12. Trageser's reliance on Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), is misplaced. That was not an employment discrimination case. She also relies on several § 504 employment discrimination cases, decided prior to the 1978 amendments. See, e.g., Drennon v. Philadelphia General Hospital, 428 F.Supp. 809, 814-16 (E.D. Pa. 1977); Gurmankin v. Costanzo, 411 F.Supp. 982, 989 (E.D. Pa. 1976), aff'd on other grounds, 556 F.2d 184 (3d Cir. 1977) (dicta). These cases, however, did not address the application of § 604 of Title VI.

III

Trageser also based her complaint on 42 U.S.C. §1983, the fourteenth amendment, and the equal protection component of the due process clause in the fifth amendment. We conclude, however, that the district court correctly granted Libbie's motion to dismiss these claims.

Section 1983 requires Trageser to show that Libbie acted under color of either a state law or regulation or a state-enforced custom. Adickes v. S. H. Kress & Co., 398 U.S. 144, 148, 161-69 (1970). To establish a denial of equal protection of the laws in violation of the fifth and fourteenth amendments, Trageser is required to do more than merely allege governmental regulation of the nursing home. She must demonstrate that Libbie's ostensibly private conduct was in reality an act of either the state or federal government. There must exist "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). To satisfy this requirement, Trageser relies on (1) Libbie's receipt of public funds and (2) the state inspector's role in Libbie's decision to dismiss her.

Libbie did not participate in the Hill-Burton construction program which "subjects hospitals to an elaborate and intricate pattern of governmental regulations, both state and federal." See Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959, 964 (4th Cir. 1963). Consequently, our decision in Simkins which detected state aciton in the oper-

ation of participating hospitals does not control here. Moreover, we have previously held that the receipt of Medicaid funds does not convert private medical care to state action. Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977). For similar reasons, we decline to ascribe state action to Libbie's receipt of Medicare and Veterans Administration benefits.

To show state action, Trageser also relies on the query of the state inspector who, noting that her eyesight had deteriorated, asked what Libbie intended to do about it. The inspector did not include this observation about Trageser among the deficiencies found at the home, and Trageser does not allege that the state would or could impose any sanctions on Libbie if it continued to employ her. Libbie's subsequent decision to dismiss her, therefore, cannot be considered an action of the state itself. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

Consequently, neither Libbie's receipt of patients' benefits nor Virginia's regulation of the home constitutes state action sufficient to sustain the §1983 and constitutional claims.

The judgment of the district court is affirmed.

FILED, AUG 17, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NOVELLA H. TRAGESER	:	
	:	
v.	:	CIVIL
	:	ACTION
LIBBIE REHABILITATION CENTER, INC., etc.	:	NO. 77-0191-R

MEMORANDUM

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendant seeks in its motion of 3 August 1977 to dismiss the above styled action. As plaintiff's resonsive brief and defendant's rebuttal brief have both been timely filed with the Court, the matter is now ripe for disposition.

A brief summary of the facts may be helpful. The defendant is a private corporation which operates a nursing home in Richmond, Virginia for profit. It enjoys no tax-exempt status nor was construction of its nursing home funded under the Hill-Burton Act. Defendant receives payments for services rendered under the Medicare, Medicaid and Veteran's Administration programs and is subject to inspection by the State Department of Health.

Plaintiff, the Director of Nursing of said nursing home, suffers from retinitis pigmutosa, a progressive hereditary visual impairment. During a regular inspection of the nursing home in April of 1976, a representative of the Department of Health commented on plaintiff's failing eyesight. That comment was reported to defendant's Board of Directors. On 7 June 1976, the

Board of Directors resolved to replace plaintiff as Director of Nursing as soon as possible. Some three months later plaintiff tendered here resignation, effective 8 September 1975 and left defendant's employ.

Plaintiff's complaint alleges that in terminating her employment, defendant engaged in State action and acted under color of law so as to violate Amendments V and XIV of the United States Constitution and 42 U.S.C. § 1983. Plaintiff further alleges that defendant engaged in discrimination in violation of Section 794 of the Federal Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq.

To satisfy the State action requirement of Section 1983, plaintiff argues that regulation by the State renders action by the nursing home State action within the meaning of Section 1983. Defendant argues that the weight of authority is contra to plaintiff's position and cites, among others, Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972) and Jackson v. Metropolitan Edison, 419 U.S. 345 (1974). A careful reading of these two cases readily shows that more than mere regulation is necessary to constitute State action. As enunciated by the Supreme Court in Jackson, the test for State action in the context of State regulation is whether there is a sufficient close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. 419 U.S. at 351. As the decision in the instant case to replace plaintiff as Director of Nursing was that of the defendant's Board of Directors and not the State, such nexus as set forth in Jackson does not exist.

In support of her State action argument, plaintiff further argues that receipt of federal funding in the form of Medicare, Medicaid and Veteran's Administration programs by defendant's nursing home transforms the acts of the nursing home into those of the State. Plaintiff cites Doe v. Charleston Area Medical Center, 529 F.2d 638 (4th Cir. 1975) as authority. In Doe a woman desiring an abortion brought a class action against a private medical center which refused to perform abortions except to save the life of the mother, such refusal being based in part on a State abortion law. The Fourth Circuit held that federal jurisdiction existed as State action was present. Plaintiff argues that Doe is binding in the case at bar as Doe involved a private hospital which received Medicare and Medicaid funds. Doe is readily distinguishable, however, as the Fourth Circuit based its holding that State action was present not on the basis of federal funding but rather on the fact that in Doe the defendant's anti-abortion policy, being based on West Virginia's criminal abortion statute, involved the State sufficiently to constitute the policy "State action" under 42 U.S.C. §1983. In the instant case nothing in the stipulations supports any State sanction - at most a suggestion. Although plaintiff argues that defendant's Board of Directors based its dismissal of plaintiff on State accredation requirements, such position is supported nowhere in the record. Indeed, the State Department of Health did not even list plaintiff's handicap as a deficiency.

Finally, plaintiff alleges a claim under Section 794 of the Federal Rehabilitation Act of 1973, 29 U.S.C. §701, et. seq. Unlike Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5, et seq, or the

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, the Federal Rehabilitation Act provides no specific grant of a private cause of action. There is no clear legislative history of Section 794 indicating a Congressional intent to provide a handicapped employee with a private right of action against his private employer. Furthermore, as Section 794 only pertains to "any program or activity receiving Federal financial assistance," jurisdicton cannot be invoked by plaintiff as defendant's nursing home has not received such assistance. The federal funds received by the nursing home are not "federal assistance" but rather payment for services rendered. Federal judges receive federal salary checks each month but it is not supposed that this is "assist." It is presumed that they are being paid an approximation, at least, of what they should be compensated for judging. Even if Section 794 creates a private right, which is not decided here, no such right could reasonably be contended for in the absence of a showing that said nursing home is a "program or activity receiving federal financial assistance."

An appropriate order shall issue.

[D. Dortch Warriner]
United States District Judge

FILED AUG 17, 1977 CLERK, U.S.D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NOVELLA H. TRAGESER	:	
	:	CIVIL ACTION
v.	:	NO: 77-0191-R
	:	
LIBBIE REHABILITATION CENTER, INC., etc.	:	

O R D E R

In accordance with the memorandum this day filed, and deeming it just and proper so to do, it is ADJUDGED and ORDERED that defendant Libbie Rehabilitation Center, Inc. t/a Libbie Convalescent Home's motion of 3 August 1977 to dismiss the above styled action be, and the same is hereby GRANTED.

Let the Clerk send a copy of this order and the memorandum to all counsel of record.

[D. Dortch Warriner]
United States District Judge

Dated: 16 August 1977